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*** Filed ***
08/29/2011 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000405-001 DT 08/25/2011

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
H. Beal
Deputy

RICHARD HUNTER
PATRICIA RUIZ
ALICE OLVERA
BRIAN KAHOVER
STACIE KAHOVER
CYNTHIA SHOBE
JOHN BUTTS
BRIAN BOGGS
ERIC DHIURZ
JEFF PINNEY
FRANCIS PINNEY
DUSTIN KUBE
BRENDA SMITH
MIKE ROUTSON
RAY CAIRNS
DAN DIGIOVANNI
RIC BARDEA
KOLYNN BARDEA

RICHARD HUNTER
1061 E GREENWAY DR
TEMPE AZ 85282
PATRICIA RUIZ
1086 E GREENWAY DR
TEMPE AZ 85282
ALICE OLVERA
1080 E GREENWAY DR
TEMPE AZ 85282
BRIAN KAHOVER
4419 S RITA LN
TEMPE AZ 85282
STACIE KAHOVER
4419 S RITA LN
TEMPE AZ 85282
CYNTHIA SHOBE
4401 S RITA LN
TEMPE AZ 85282
JOHN BUTTS
4401 S RITA LN
TEMPE AZ 85282
BRIAN BOGGS
4410 S RITA LN
TEMPE AZ 85282
ERIC DHIURZ
4410 S RITA LN
TEMPE AZ 85282
JEFF PINNEY
4418 S RITA LN
TEMPE AZ 85282
FRANCIS PINNEY
4418 S RITA LN
TEMPE AZ 85282
DUSTIN KUBE

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000405-001 DT 08/25/2011

4407 S RITA LN
TEMPE AZ 85282
BRENDA SMITH
4404 S RITA LN
TEMPE AZ 85282
MIKE ROUTSON
1039 E GREENWAY DR
TEMPE AZ 85282
RAY CAIRNS
1056 E GREENWAY DR
TEMPE AZ 85282
DAN DIGIOVANNI
1062 E GREENWAY DR
TEMPE AZ 85282
RIC BARDEA
1046 E CARSON DR
TEMPE AZ 85282
KOLYNN BARDEA
1046 E CARSON DR
TEMPE AZ 85282

v.

YVETTE CASTANEDA (001)

YVETTE CASTANEDA
1025 E GREENWAY DR
TEMPE AZ 85282

REMAND DESK-LCA-CCC
UNIVERSITY LAKES JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case No.2011027018RC

Defendant Appellant Yvette Castaneda, (Defendant) appeals the Justice Court's determination that her dog, Kibby, is a vicious animal and the University Lakes Justice Court's order that Kibby be euthanized. Defendant contends the trial court erred. For the reasons stated below, the court reverses the trial court's judgment.

In addition to Defendant's appeal, Defendant filed a separate motion requesting the dog—Kibby—be released pending the results of the appeal. For the reasons stated below, this request shall be denied

I. FACTUAL BACKGROUND.

On February 8, 2011, Plaintiff[1] filed a complaint alleging Defendant's dog—Kibby—had a propensity to bite without provocation and had injured a human being. Defendant responded and admitted she owns the dog and the dog had attacked a postman. Defendant denied her dog attacked without provocation. On March 14, 2011, the trial court set a trial date of October 19, 2011, at 2:30 P.M.[2] On the same day, the trial court set the matter for a comprehensive pre-trial conference to be held at 10:00 A.M. on April 13, 2011.[3] The parties did not settle the case at the pre-trial conference.[4] The pre-trial conference report indicates the trial court and the parties determined the trial would last approximately 2 hours. Plaintiff and Defendant signed and dated the pre-trial conference report on April 13, 2011.[5]

On the same day, April 13, 2011, Plaintiff filed a Citizen's Petition for Disposition Hearing on Vicious Animal(s). Defendant alleges the trial court advised Plaintiff to file this request.[6] In support of her allegation, Defendant provides this court with an affidavit from Julie Castaneda dated May 4, 2011. This affidavit refers to a hearing on April 27, 2011, as a pre-trial conference hearing. This Court cannot determine if Ms. Castaneda's affidavit refers to the April 27, 2011, vicious dog hearing or the April 13, 2011, pre-trial conference.

On April 12, 2011,[7] the Court set the matter for a disposition hearing to be held at 8:15 A.M. on April 27, 2011.[8] The notice of the disposition hearing informed the parties:

> A petition has been filed alleging that the animal described below is the property of the respondent and is vicious and may be a danger to the safety of any person or other animal.

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[1] There are a number of named plaintiffs in this case. For ease in understanding the opinion, the plaintiffs will collectively be referred to as Plaintiff.
[2] Notice of Court Date dated 3-14-11.
[3] Notice of Comprehensive Pretrial Conference Hearing Date dated 3-14-11.
[4] Pretrial Conference Report dated 4-13-2011.
[5] *Id*.
[6] Defendant alleged: "On 4-13-2011, the [sic] Justice Ore held a pre-trial conference to resolve any issues. The person sitting at this pre-trial conference was the same Justice of the peace sitting on the bench during the 'vicious dog hearing'. Justice Ore literally told the Plaintiff in front of the Court that Plaintiff could file a motion for 'a vicious dog hearing.'" (Exhibit D, affidavit of Julie Castaneda). Appellants' [sic] Memoranda [sic] in Support of Appeal/Oral Argument Requested, p.2, filed May 4, 2011, at University Lakes Justice Court.
[7] This Court cannot determine if the April 12, 2011, date on the preprinted Notice of Disposition Hearing on Vicious Animals is correct or incorrect. The trial court's Docket indicates the pre-trial conference was held on April 12, 2011 but the Citizen's Petition for Disposition Hearing on Vicious Animals was not filed until the following day.
[8] Notice of Disposition Hearing on Vicious Animals dated 4/12/11 and signed by M. Burton-Cahill.

The notice further stated:

> A disposition hearing is requested pursuant to AIRS [sic] 11–1029 A, and if the animal is determined to be vicious, an order to destroy the animal pursuant to ARS 11–1014G.

The notice contained no description of the animal. On April 13, 2011, Plaintiff filed a motion requesting the complaint be amended to a vicious dog hearing. According to the certificate, Plaintiff sent a copy to Defendant on April 13, 2011. This Motion to Amend informed Defendant—as responding party—she would have 10 days to file a written response or objection to the motion.

On April 14, 2011, the trial court granted the motion to amend the complaint to a vicious dog hearing[9] and vacated the previously set bench trial date of October 19, 2011, stating the bench trial was vacated as "this case is now a vicious dog hearing set for 4-27-11 at 8:15 A.M."[10] On April 26, 2011, one day before the scheduled hearing, Defendant sent a Motion to Strike Plaintiff's Amendment and Motion to Dismiss Complaint to Plaintiff.

On April 26, 2011, Defendant also requested a Motion for Continuance [sic] as she was in Ohio and would not be returning until April 30, 2011, at 8:57 P.M. The trial court denied Defendant's Motion to Continue in open court at the April 27, 2011, hearing. Defendant was not present. The trial court also denied Defendant's Motion to Strike Plaintiff's Amendment and Motion to Dismiss and continued with the court's scheduled hearing.

At the hearing,[11] Alfred Montoya[12]—a postman[13]—testified about his previous encounter with Kibby. He stated he was delivering mail across the street from Defendant's home and heard the dog run at him.[14] He said he did not provoke the dog[15] and apparently the dog had broken its leash.[16] Mr. Montoya further testified Kibby chewed up his left arm and grabbed his right elbow.[17] He received three bites on his left arm[18] and three bites on his right arm.[19]

. . . .

[9] Court case card from University Lakes Justice Court for CC2011027018.
[10] Maricopa County Justice Courts, Ruling on Motion dated 4/14/11.
[11] Audio recording, hearing, April 27, 2011.
[12] *Id*. at 8:24:53.
[13] *Id*. at 8:25:25.
[14] *Id*. at 8:25:25. Mr. Montoya said he heard claws on the concrete.
[15] *Id*. at 8:27:44.
[16] *Id*. at 8:25:35 and 8:28:20. Mr. Montoya's testimony was he tried jamming mail in the dog's mouth and he noticed a piece of leash still on the dog's collar. He said the dog broke its leash. Mr. Montoya also said the leash looked like a bicycle leash. 8:29:28.
[17] *Id*. at 8:26:00–08.
[18] *Id*. at 8:25:50.
[19] *Id*. at 8:28:37.

When the hearing concluded, the trial court found Kibby was a vicious dog and ordered that Kibby be humanely destroyed. The court further ordered Rabies Animal Control to impound Kibby and hold Kibby for 14 days pending Defendant's right to appeal. Defendant was ordered to pay the impound fees and any other costs for sheltering Kibby. In making this ruling, the trial court remarked the dog's attack was unprovoked and the dog was not on its owner's property. The trial court also stated having the dog outside on a leash was irresponsible on the part of Kibby's owner.[20] The trial court commented on Defendant's lack of insurance and potential inability to compensate any victim should Kibby attack another.[21] Additionally, the trial court considered the ramifications had Kibby attacked a child rather than a postman.[22]

Defendant filed a timely appeal on May 4, 2011. Plaintiff (Appellee) failed to answer timely. On July 12, 2011, Plaintiff filed a request for more time to respond to the appeal. Plaintiff's request is untimely as Plaintiff's time to respond lapsed on June 6, 2011. Rule 8 (a) (1) Superior Court R. of App. Proc.—Civ. (SCRAP—Civ.). Motions for More time must be presented to the trial court. Rule 8 (b) Superior Court R. of App. Proc.—Civ. (SCRAP—Civ.). Plaintiff failed to do this. Plaintiff also failed to provide any reason for their requested extension of time to answer. This matter shall be determined based on the record and Defendant-/Appellant's memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Do the Plaintiffs Have Standing to Bring the Action Against Defendant and Her Dog.

Defendant alleges Plaintiff lack standing to bring an action against her as they have had little or no contact with Kibby. Defendant asserts—in her appellate memorandum re Statement of the Facts[sic]—"The Plaintiff has never had any contact with my dog nor have any of the other Plaintiffs with the exception of one Plaintiff." This, however, does not necessarily mean the Plaintiff lacks standing. In discussing standing, our Supreme Court stated:

> However, Arizona courts consistently have required as a matter of judicial restraint that a party possess standing to maintain an action. . . . The requirement is important: the presence of standing sharpens the legal issues presented by ensuring that true adversaries are before the court and thereby assures that our courts do not issue mere advisory opinions.

Sears v. Hull, 192 Ariz. 65, 961 P.2d 1013 ¶ 24 (1998) (citations omitted.) In *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 108 P.3d 917, ¶¶ 6–7 (2005), the Arizona Supreme Court stated a plaintiff must allege a distinct injury. Plaintiff meets this

[20] *Id*. at 8:30:12–8:30:42 and 8:33:43.
[21] No evidence was presented about Defendant's finances or insurance at this hearing. Although the trial court noted no testimony was given about this issue, the trial court considered the insurance issue. *Id.* at 8:30:50–8:31.31.
[22] *Id*. at 8:30:42 and 8:34:01.

standard. Plaintiff lives in the neighborhood. Defendant agrees—as she must—Kibby has killed one cat in the neighborhood and has bitten the postman. An incident report about the bites and a judicial proceeding in the Tempe Municipal Court confirm the bites. Indeed, Defendant pled guilty to the violation of Tempe Municipal Code TCC § 6–30 (c) for a "dog at large" violation. As a result of the bites, the Post Office suspended direct mail delivery to the homes on the 1000 block of Greenway on a temporary basis and, instead, installed a Neighborhood Delivery and Collection Box Unit (NDCBU) in the neighborhood.[23] Thus, plaintiffs have lost the ability to have mail directly delivered and have had their peace and enjoyment disturbed by Kibby's actions. This Court finds the Plaintiff has standing.

B. Did the Trial Court Abuse Its Discretion By Holding a Trial Before Defendant's Time to Respond to the Motion Had Elapsed.

Plaintiff filed a Motion to Amend the Complaint to a complaint for a vicious dog hearing on April 13, 2011. Defendant was notified about the amendment. The Motion does not indicate how Defendant received notification. Defendant was also informed—on the face of the preprinted motion form—she would have 10 days in which to respond. When calculating days, the day from which the designated period of time begins to run shall not be included. Rule 6 (a) A.R.C.P. Thus the first day would be April 14, 2011. When the time period is less than 11 days, intermediate Saturdays, Sundays, and legal holidays are not included in the computation. Rule 6 (a) A.R.C.P. Allowing no mailing time, Defendant had until the close of business on April 27, 2011, in which to file her response. If Defendant received the notice by mail, she would have had an additional five mailing days added to the allowed time period. Despite the required time period, the trial court (1) ruled on and granted the motion on April 14, 2011, and (2) held a hearing at 8:15 A.M. on April 27, 2011. This hearing deprived Defendant of her allowable time to respond. The trial court erred by (1) granting Plaintiff's motion before Defendant's time to respond had ended and (2) then going forward with the pre-set hearing before Defendant's time to respond had ended. Defendant filed a timely response on April 26, 2011, contesting Plaintiff's Motion to Amend. However, the trial court had already determined it would grant Plaintiff's request before even considering Defendant's position. In this, the trial court erred and deprived Defendant of her opportunity to be heard. It is axiomatic that due process requires each party to a dispute to have the opportunity to be heard. *Monica C. v. Arizona Dept. of Economic Sec.*, 211 Ariz. 89, 118 P.3d 37 (Ct. App. 2005). Indeed, in addition to a general due process right to be heard, Defendant had the right to a guaranteed number of days in which to respond—a right guaranteed by the Arizona Rules of Civil Procedure. In this case, Defendant was denied this opportunity as the trial court granted Plaintiff's motion the day after it was filed.

. . . .

[23] United States Postal Service letter dated February 1, 2011, from Dan Toth, Station Manager.

C. Did the Trial Court Abuse Its Discretion By Failing to Grant Defendant a Motion to Continue When Defendant was Out of Town.

Defendant filed a Motion to Continue on April 26, 2011, one day before the scheduled hearing. Defendant was advised of the April 27, 2011, hearing on April 12, 2011 in the Notice of Disposition Hearing on Vicious Animals. Defendant was provided a second notice of the April 27, 2011, hearing in the Ruling on Motion dated April 14, 2011. In her Motion to Continue, Defendant advised the Court she was currently in Ohio and unable to attend the April 27, 2011 hearing. She provided no reason other than the fact she was not in Arizona in her motion. This Court has no information as to why Defendant was unable to be in Arizona or chose to not be in Arizona or when she left Arizona. Similarly, Defendant provided the trial court with no information about (1) why she was not in Arizona and (2) if or (3) why she was unable to be in Arizona. Defendant gave the trial court no information about when she left Arizona.

Motions to Continue are left to the sound discretion of the trial court. *State v. Laffoon*, 125 Ariz. 484, 486, 610 P.2d 1045, 1047 (1980). Absent clear error, this Court shall not substitute its judgment for that of the trial court which was in the best position to evaluate competing considerations. This Court notes the Defendant failed to give the trial court information which the trial court might have used in weighing Defendant's request. Although this Court may be sympathetic to Defendant's inability to be present at this very important hearing, Defendant is reminded she has an obligation to attend scheduled court appearances. Her personal schedule or desire must be weighed against the Court's need to follow its scheduled court calendar.[24] Additionally, the trial court remarked it received Defendant's request for a Motion to Continue at approximately 4:00 P.M. on April 26, 2011, less than one day before Defendant's scheduled appearance. Defendant provided the trial court with no information as to why she delayed until the last minute in requesting the trial court continue the proceeding and no information about any extraordinary circumstances compelling her attendance out of state.

D. Did the Trial Court Abuse Its Discretion By Including Information from Prior Hearings that Was Not Presented During Trial as a Basis for Its Ruling.

In ruling at the hearing, the trial court referred to (1) Defendant's irresponsibility; (2) Defendant's lack of homeowner's or renter's insurance; and (3) the danger the dog posed to the neighborhood. The trial court received evidence on only one of these issues—the danger Kibby allegedly posed. The postman testified about the bite at the trial. While the postman's injury may have been litigated at a proceeding in the Tempe Municipal Court, plaintiffs could certainly obtain testimony from the postman to support their contention Kibby posed a danger. The trial

[24] Defendant refers to an Affidavit from Rudy Castaneda saying the clerk advised her about the ruling on the Motion to Continue. "I asked the clerk about the motion for continuance for my daughter and the clerk told me that the motion would be denied because there wasn't enough time to notify all the other plaintiff's [sic]." Clerks are not empowered to rule on motions. Only the trial court is able to rule on the motion. The trial court denied the motion at the April 27, 2011, hearing as untimely. Audio recording, hearing, *id*. at 8:22:18.

court could certainly have considered that testimony in evaluating any risk Kibby presented. However, the trial court received no evidence about Defendant's insurance or lack of insurance and nothing about whether Defendant was acting as a responsible dog owner should act. Yet, these two considerations appear to have weighed heavily in the trial court's ultimate determination. The hearing took approximately 12 minutes. The trial court spent almost 5 minutes in explaining the ruling and ended by stating in most cases the court would have declared the dog vicious. In this case, however, the trial court went beyond making the declaration, and ordered Kibby be euthanized. This is inappropriate. Trial court determinations must be based on the evidence produced in court and not on general assumptions or personal viewpoints of the problems should a defendant be financially unable to timely compensate a successful plaintiff.

On appeal, the appellate court must accept the trial court's findings of fact as true unless they are clearly erroneous or unsupported by any credible evidence in the record. *Wilson v. Tucson General Hospital*, 18 Ariz. App. 31, 22, 499 P.2d 782, 764 (Ct. App. 1972); *Spain v. Griffith*, 42 Ariz. 304, 305 25 P.2d 551, (1933) holding ". . . if there is no evidence in the record which would justify such a conclusion by the triers of fact, it is not only our right, but our duty, to set aside a verdict." Here, the comments about Defendant's insurance or lack of insurance were not supported by the record. However, because the trial court's ruling has been reversed based on the procedural errors, this Court finds the trial court's comments to be harmless error.

E. Did the Trial Court Err by Ordering Kibby Be Confined During the Appellate Process.

The trial court ordered that Kibby be confined during the pendency of an appeal. Defendant has already been convicted because she allowed Kibby to run at large. Kibby has killed a family pet—a cat—and has bitten a person. Pursuant to A.R.S. § 11–1014 (H) a city magistrate or justice of the peace may impose procedures to protect all parties in the interest of justice. Defendant has already shown poor judgment in allowing Kibby to remain outside of her home without supervision. Although Kibby was leashed, Kibby was able to break away from the leash and attack a person on the other side of the street. The trial court was presented with information about this attack. The trial court rightly considered if Kibby would pose a danger in the neighborhood and concluded Kibby could pose a danger. Defendant has not shown reasonable care in confining Kibby even after Kibby killed a neighbor's cat in April, 2010. The cat killing episode should have put Defendant on notice about Kibby's problems with other living beings. Indeed, but for a short quarantine period, Kibby remained at Defendant's home from December 24, 2010—the day Kibby bit the postman—until Kibby was impounded in April, 2011. There is no showing that Defendant voluntarily confined Kibby during this intervening time. While Defendant alleges Plaintiff has not proven provocation, this court notes the issue of provocation is determined by "whether a reasonable person would expect that the conduct or circumstances would be likely to provoke a dog." A.R.S. § 11–1027. At the April 27, 2011 hearing, the postman testified he had crossed the street to avoid going on the property where Kibby resided but Kibby broke the leash and ran across the street to where the postman was located. This Court makes no ruling on the issue of provocation at this time. That issue is an

issue left for further proceedings. However, because Plaintiff produced evidence—uncontroverted by Defendant—that Kibby attacked a postman who was not even on the Defendant owner's property, this Court finds it is in the community's best interest for Kibby to remain confined during the pendency of these proceedings.

III. CONCLUSION.

Based on the foregoing, this Court concludes the University Lakes Justice Court erred by (1) summarily granting Plaintiffs' motion to amend before Defendant's time to respond had elapsed; and (2) proceeding with the vicious dog hearing before Defendant's time to respond had passed.

IT IS THEREFORE ORDERED reversing the judgment of the University Lakes Justice Court.

IT IS FURTHER ORDERED remanding this matter to the University Lakes Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

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THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 082520111540